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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 67

WADE GARRETT, PETITIONER,

vs.

MOORE-McCORMACK COMPANY, INC., AND AMERICAN SCANTIC LINE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED APRIL 4, 1942.

CERTIORARI GRANTED MAY 11, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN COURT OF COMMON PLEAS, No. 5, COUNTY OF PHILADELPHIA

OPINION

SMITH, P. J.:

Wade Garrett, a seaman 40 years of age, was employed by the Moore and McCormack Company, Inc. on January 10, 1937 as a deck maintenance man with a pay of $50. per month and board and lodging on the SS Minnequa for a voyage from New York City to Baltic ports and return. About two days before the ship arrived at Gothenburg, working on the ventilator deck while there was a rough sea running, Garrett slipped and fell on the soapy deck. In falling, he threw out his left hand to save himself and caught the raising gear of a top grating over the ventilator which was open at the time. This grating fell upon him and caused him to be injured. The grating over the hatchway was a covering about 8 feet long by 4 feet wide and weighed about 200 pounds. At the rear of said grating there were hinges. It was held up and open by two braces or legs at each corner of the grating. The claim of negligence is that the cotter pins which should have been at a point where the props and hinges met were missing. The question of negligence and the quantum of injuries were left to the jury by the trial judge and the jury brought in a verdict for the plaintiff against the defendants in the sum of $4,000. The Defendants filed a point for binding instructions which was refused by the trial judge. The defendants filed motions for a new trial and judgment non obstante veredicto.

While there was considerable evidence presented from [fol. 2] which the jury might have found that the injuries claimed by the plaintiff as a result of the falling of the hatch covering upon him were of a minor nature and that those injuries now complained of were received by the plaintiff either on a prior occasion or in a brawl on shore while the ship was in one of the Baltic ports. The trial judge left the matter to the jury. In a fair and impartial charge, the evidence for the plaintiff and defendants was properly analyzed. The trial judge said on page 281 (N. T.):

"The big question in this case is whether or not Wade Garrett sustained the injury he claims he sustained as a result of this accident. On the one hand you have his statement of his injuries and on the other hand you have the contention of the defendant that all of the injuries that he sustained in this case he had before he fell. They point to the X Ray taken in 1935, and to the testimony of Dr. Russell, to the fact that there are signs of an old fracture in that X Ray in exactly the same places that he claims were fractured, by that hatch cover. If that is a fact, or if you are not satisfied by the fair weight of the evidence, that he sustained these fractures, in this accident then that goes out of the case."

Therefore, as to the question of negligence and injuries received, since the jury found for the plaintiff, all facts must be considered most favorably as presented by him. Therefore the motion of defendants for a new trial should be refused.

Insofar as the motion for judgment non obstante veredicto is concerned, the court must consider the evidence presented insofar as it relates to a release and receipt [fol. 3] which was signed and executed by the plaintiff.

After having received medical care in the town of Gdynia, Poland, Garrett returned to Jersey City on a ship of the defendant. There in the company office or at the ship, he met a man by the name of Suessmuth, an employe of the defendant in charge of claims. Garrett said to him that he wanted some money. Mr. Suessmuth informed him that the company did not owe him anything. Garrett, the plaintiff, then filed with Mr. Suessmuth a report of personal injuries sustained by him on the said ship Minnequa. When Garrett insisted that he needed some money to go to a hospital, Suessmuth advised him to go to Hudson and Jay where a hospital was located to have some X Rays taken and gave him the sum of $15. Garrett left. He returned the next day and asked for more money, saying that he had some bills to pay. This money was again advanced by Suessmuth. Two days later, the plaintiff again returned and asked for more money and was given the sum of either $2. or $3. On this occasion, the plaintiff advised Suessmuth that he "wanted whatever was coming" to him (N. T. p. 61). He admitted that at the time he pressed Suessmuth for what was coming to him, he was aware of

the fact that while in Gdynia, Poland, he had signed a voucher to the effect that he had been paid in full for services up to February 8, 1937. He testified that he can read English. He explained however, that when he signed this voucher in Gdynia, he was full of dope in the hospital and did not pay much attention to what he had signed. He testified that at the time he appeared in the office of the defendant company, he should have been entitled to three months' wages which would have been paid him had he [fol. 4] completed the *the* entire voyage which ended in March, 1937. On page 62, N. T., in reply to the question:

"Q. You shipped in New York so you knew that the money you were entitled to would be a month's wages?

"A. I figured I had three months' wages coming to me. I may have been wrong, but that's the way I figured."

The plaintiff was asked whether or not during the conversation in the defendant's office, had not Mr. Suessmuth told him of the report of the captain of the ship which showed that he had been injured in a brawl on shore instead of by the falling of the hatch covering. The plaintiff answered "I do not remember Mr. Suessmuth telling me that."

When the plaintiff demanded from Suessmuth what was coming to him, Suessmuth offered to pay him the sum of one hundred dollars if he would sign a receipt and release and then suggested to Garrett that he go home and think it over and come back the next day. Garrett returned the next day and again Suessmuth asked him if he was willing to take the sum of One hundred dollars less the sums of $10., $15., and $3. already paid him, and Garrett said yes. Suessmuth then prepared a formal receipt and release in writing, called over two witnesses who were in the office at the time, Garrett read the receipt and release, signed it and had it witnessed by the two men in the office. Suessmuth then gave him the receipt and release which was placed in an envelope together with a letter addressed to the cashier of the defendant company, and Garrett took this envelope from Pier "D", Exchange Place, Jersey City, to [fol. 5] No. 5 Broadway, New York City where the business office of the defendant was located. The Plaintiff testified (p. 70, N. T.):

"He gave me an envelope and I carried it to 5 Broadway and I gave the envelope in there and I opened it up and he

gave me a piece of paper back and I signed it, and then they gave me the money."

The receipt and release which is attached to the evidence was typed in the office of the defendant. It is a release from all claims and demands "of and from all manner of actions, suits, liens, debts, dues, trespasses, damages, injuries, sums of money controversies, agreements, claims and demands in law or admiralty etc. etc." . . . "particularly in connection with any and all injuries and illness sustained while in the service of the SS Minnequa particularly the injury sustained on or about January 28 1937 and January 23, 1937."

When Garrett signed this release under seal, he signed an additional statement at the end of the release as follows:

"I realize that I am accepting $100 for all my claims against the SS Minnequa, Moore & McCormack Company, Inc., the American Scantic Line, Inc. and U. S. Maritime Commission.

Wade Garrett."

There is ample evidence to the effect that at the time Garrett signed this release, he had knowledge of the character of a release. On at least three previous occasions, Garrett had had accidents on a number of other vessels [fol. 6] (P. 36, N. T.) and still had a case pending against the Southern Steamship Company for an alleged injury on one of its ships. Garrett admits signing three releases for injuries on the SS Pontiac, SS James J. Hill, and SS George Humphrey, all prior to the time that he shipped as a sailor on the SS Minnequa.

The plaintiff attempts to overcome this written release and receipt executed by him by his own evidence uncorroborated. He testified that the reason he executed the release was because Suessmuth had said to him: "If you don't sign here and take your money and go to Chicago, I am going to put you in jail." Garrett furthermore said: "I was drunk." He further testified: "I had taken about half a dozen of them (vernal pills) the night before and some the next morning just before I went to see him." The plaintiff did not present any evidence from anyone else to the effect that anyone had seen him drunk that morning or that anyone had observed that he was in an unnatural condition as a result of taking a large amount of sedatives.

On the contrary, Philip Yarnell, one of the witnesses to the release, testified that he heard Suessmuth say to Garrett, "You read the contents of this release before you sign it so that I (you) will know what you are signing." Yarnell further testified that Garrett did read the receipt and release and after having done so, signed it.

Suessmuth testified that every time Garrett came into the office of the defendant on the three occasions above mentioned, he was sober. He testified that on the day he signed the receipt and release, he was sober and was not at all dopey [fol. 7] or dazed. Suessmuth testified that when Garrett came into the office, "he advised me that he had decided to accept our offer of $100." Suessmuth testified that he had the receipt and release typed and that he gave it to Garrett and told him to read it and that Garrett read the receipt and release. Suessmuth further testified that he asked Garrett if he would sign it and Garrett answered yes. Then it was that Suessmuth called over the two witnesses and in their presence Garrett signed the said instrument. Suessmuth testified that he wrote a memorandum to the cashier of their New York office, enclosing the release, that he put them in an envelope and gave them to Garrett. Suessmuth was asked whether or not Garrett was sober at that time and he testified "he was perfectly sober." He was further questioned "Did he show any signs of alcohol or drinking?" He answered "None at all." When further questioned as to whether the plaintiff showed signs of being dopey or not knowing what he was doing he replied "none at all."

Under the cases of this Commonwealth, it is the duty of the court to determine as a matter of law whether the quantum and character of evidence presented by a plaintiff to overcome a release in writing meets the burden of proof. If the evidence is not clear, precise and indubitable, the court must withdraw the case from the jury. Considering all the evidence presented surrounding the execution of this written instrument by the plaintiff we are of the opinion that he has failed to meet this burden of proof.

The plaintiff admitted that he was an American and could read and write. His explanation that he was drunk; affected [fol. 8] by *by* vernal; that the agent had threatened to have him arrested if he did not sign it, indicates to some degree at least that he knew he was signing a release. He first attempts to overcome the written instrument by testimony

that he was drunk or affected by drugs and did not know what he was doing, and yet on the other hand, he attempts to explain his execution of this release by stating that the agent of the company made him sign it under the threat of an arrest. It is hard to understand what particular offense Garrett could have committed to cause him to be arrested, so that considering these two statements, it must be admitted that the evidence presented by the plaintiff to overcome the written instrument is flimsy and not to be believed.

If by this type and character of evidence uncorroborated by any other evidence or by circumstances surrounding the signing of the release, a plaintiff could be permitted to overcome a solemn written document, then the legal rule that such evidence must be clear, precise and indubitable would be absolutely worthless.

In the case of Penna. R. R. v. Shay, 82 Pa. 198, Mr. Justice Sharswood held that even where it is intended that the release was procured by fraud "the evidence of fraud must be clear, precise or indubitable; otherwise it should be withdrawn from the jury."

In the case of Lindemann v. Pittsburgh Rwys., 251 Pa. 489, it was stated: Indubitable proof is evidence that is not only found to be credible but of such weight and directness as to make out the facts alleged beyond a reasonable doubt.

In the case of Ralston et ux. v. Phila. R. T. Co., 267 Pa. [fol. 9] 257, Mr. Justice Moschzisker reported many cases in this Commonwealth on this question. On page 275, he said:

"* * * the evidence clearly fails to measure up to the required legal standard, which, as hereinbefore shown, is that in such cases the proofs must be clear, precise and indubitable. The first mentioned requirements mean that the witnesses must be credible, distinctly remember the facts to which they testify and narrate the details exactly (Lindemann v. Pittsburgh Rys. Co., supra); and, to the extent we are at present concerned with the last requirement—that the statement of the witnesses must be indubitable, or true (that is, so far as we are concerned with its application to the preliminary consideration of the evidence by the court, to judge of its sufficiency to go to the jury. * * *"

In the case of Horsey v. Ciaroro, 280 Pa. 513, Mr. Justice Sadler on p. 516 said:

"Though the sum accepted may have been small, and the fee for services, charged by Acker, large, yet this is not sufficient to establish such fraud as to justify setting aside the release.

'Where, in a negligence case, defendant sets up a release of damages executed by plaintiff, and the latter seeks to have the jury disregard it, and the essential facts in regard to its execution are in dispute, the burden is on plaintiff to [fol. 10] prove the facts upon which she relies, beyond a reasonable doubt, by evidence which is clear, precise and indubitable, and by witnesses who are credible, who distinctly remember the facts to which they testify and narrate the details exactly': Ralston v. P. R. T., Co., 267 Pa. 257."

In the case of Walker v. Harbison, 283 Pa. 111, Mr. Justice Kephart on page 114 said:

"We do not know how a stronger case of ratification could be made out. The sole evidence as to the execution of the release came from defendant's side of the case, and it clearly shows there was no fraud practiced on plaintiff. Assuming he may not have been mentally capable of executing the release, there is no evidence here that would charge this defendant with knowledge of that condition. When plaintiff was in the office of defendant's agent, the evidence shows him to have been normal."

In the case of Broida v. Travelers Insurance Company, 316 Pa. 444, it was left to the jury because of the testimony by a witness corroborating the testimony of the plaintiff regarding the signing of the release. Mr. Justice Drew on pp. 447 and 448 said:

"Nor can we agree with defendant's contention that the evidence is not clear, precise and indubitable. It may be conceded at once that it is necessary for this to be true before [fol. 11] reformation can be properly granted; see Stine v. Sherk, 1 W. & S. 195; Sylvius v. Kosek, 117 Pa. 67; Graham v. Carnigie Steel Co., 217 Pa. 34; Burt v. Burt, 221 Pa. 171. Whether the evidence meets this standard is, in an action at law, a question for the trial judge, and his ruling is open to review here: Rowand v. Finney, 96 Pa. 192; Sylvius v. Kosek, supra; Ralston v. P. R. T. Co. (No. 1), 267 Pa. 257. The phrase has a technical legal meaning. That meaning is that the witnesses must be found to be credible, that the

facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue; see Highlands v. R. R., 209 Pa. 286; Burt v. Burt, supra; Ralston v. P. R. T. Co., supra. It is not necessary that the evidence be uncontradicted (Honesdale Glass Co. v. Storms, 125 Pa. 268; Highlands v. R. R., supra; Burt v. Burt, supra), provided it 'carries conviction to the mind and if' (Burt v. Burt, supra), or 'carries a clear conviction of its truth' (Honesdale Glass Co. v. Storms, supra; Highlands v. R. R., supra)."

It would therefore appear that under the cases of this Commonwealth, the plaintiff has failed to meet his burden of proof and that the case should have been withdrawn from the jury.

It was argued by the plaintiff's counsel that the law of Pennsylvania does not apply, but that we must apply the [fol. 12] law of the Federal courts. In Admiralty cases, the responsibility is on the defendant to sustain a release rather than on a plaintiff to overcome it. Thus if the plaintiff had instituted his action in trespass in admiralty, this would be so, for a seaman in admiralty is regarded as a ward and given every possible protection. In admiralty, a hearing is before a Chancellor without a jury and all the questions of law and fact are before a judge sitting as a chancellor. *There is sufficient precedent in the admiralty courts to sustain the contention of the plaintiff had he been inclined to bring his action there.* This court has made a thorough search to ascertain whether or not in any of the state courts there is any indication that a seaman is a ward of the law, state or federal, and this court has failed to find any citation to sustain that point. *The plaintiff could have brought his action in either the admiralty, federal or state court, and he selected his forum in this court. Therefore, he is bound by law of Pennsylvania.* It was held in Atlee v. Packet Co., 21 Wallace (U. S.) 389 that a plaintiff who has the selection of the *a* forum in which to litigate his claim cannot complain of the rule of that forum.

In Goodrich on Conflict of Laws, page 197, it is stated:

"It has already been stated that matters of procedure are in general determined by the internal law of the forum.

It would naturally follow that the rules of evidence should be so classified. These relate to the way in which a case is to be proved, how facts are to be established. If the lex fori requires proof of a certain kind, it would not seem to [fol. 13] matter whether the cause of action arose within or without the jurisdiction. This is the general rule." • • •

(P. 198) "The ordinary presumption is not a rule of substance but one of procedure. It 'attaches to one evidentiary fact certain consequences as to the duty of production of other evidence by the opponent,' in other words, determines, under certain circumstances which party has the burden of going ahead with further evidence. It relates, therefore, to the manner in which facts are to be proved, rather than to the facts themselves, and it would be expected that it should be called a matter of procedure, governed by the law of the forum. The authorities so hold. The same would be true in deciding the question whether a plaintiff had established, on the facts, a case sufficient to go to the jury."

"The law of the forum governs presumptions and inferences to be drawn from evidence; Restatement of the Law of Conflict of Laws, Section 595 (2).

In Singer v. Messina, 312 Pa. 129, where the question arose as to how the matter of contributory negligence should be considered—whether under the law of New Jersey where the accident occurred or by the law of Pennsylvania where the suit was instituted. Mr. Justice Schaffer on p. 135 said:

"Under such circumstances, the correct rule is that the procedure followed in the forum is controlling when the [fol. 14] question is whether the court or the *the* jury shall pass upon the problem. This is the rule laid down in the American Law Institute's Restatement of the Law of Conflict of Laws in section 642, where the following appears: 'Mode of trial. The law of the forum determines whether an issue of fact shall be tried by the court or by a jury.'"

See also Tobin v. Penna. R. R., 100 Fed. (2) 435 and Belden v. Chase, 150 U. S. 674.

In the case of Litwinowitz v. Oriental Navigation Co., the Court of Common Pleas No. 5 of Philadelphia County granted a motion for judgment non obstante veredicto for

the defendant, in a case where a stevedore was injured by an alleged act of negligence on the part of the steamship company. On reargument, the plaintiff contended that the federal law applied. In an Opinion by this court, it was held:

"It has been, therefore, distinctly held that in admiralty the comparative negligence rule applies while in the State Court the common law rule of contributory negligence bars recovery."

This case was affirmed in 311 Pa. 257, although no mention was made in that Opinion as to the question of contributory negligence.

In the case of Penna. R. R. v. Hughes, City of Long Branch 1931 A. M. C. 852, Judge Hand of the Circuit Court of Appeals of the Second Circuit stated:

"However, it was held in Belden v. Chase, 150 U. S. 674, [fol. 15] that when action is brought at law in a State Court for a collision upon navigable waters, the Plaintiff loses, if himself negligent * * * conversely, it is well settled that when the libellant sues in Admiralty upon a tort arising within the territorial waters of the State, his contributory negligence does not defeat him altogether; he need only divide his damages."

In the case of Basford v. Standard Shipping Company, 1934 A. M. C., 1074, a seaman signed a release and then brought suit in a State Court. The court there held:

"I perceive nothing in the record which would authorize lifting the case from the general rule that 'the signer of a deed or other instrument expressive of a jural act is conclusively bound thereby'. Pimpenello v. Swift & Co., 253 N. Y. 159."

The testimony produced by the plaintiff is entirely unreliable. He was aware of the attitude taken by the defendant toward his alleged claim. On three different occasions, he accepted money from the agent of the defendant and when he asked for what he claimed was due him, an offer was made him by the agent for the defendant. Showing some reluctance about accepting it, he was told to go home think it over and come back the next day. This he did. It seems hard to believe that when he knew he was returning for the purpose of adjusting his claim with

the agent of the defendant, he would fortify himself with drink and sedatives. We must consider the other state-
[fol. 16] ment that he was forced to sign the release under threat of arrest, and we furthermore must not forget that on at least three prior occasions, he had signed releases and was aware therefore of their import. Furthermore, in considering his credibility, we must not forget that when questioned whether in 1935 (two years before) he had made a claim against the Southern Steamship Company for an injury to his back, his answer was No. The statement of claim presented in that case was put in evidence and a reading of Paragraph 8 thereof shows his statement: "He was violently wounded, jarred and generally shaken about the head, body, spine, arms, legs and feet, and particularly his face and jaw were swollen and discolored, several teeth knocked out and several ribs broken."

When one considers that the major portion of his claim of injuries is that he has arthritis from the injury received to his spine, one can see how doubtful this claim for injuries is. When his own physician, who had testified as to what the X Ray taken in 1937 disclosed, was shown an X Ray plate which was after the accident in 1935 and was asked if those were the same fractures he saw in the X Ray plates (those of 1937) his reply was Yes.

It therefore seems clear that the condition from which this man alleges he is now suffering was present in 1935. It may well be that the arthritic condition has developed, but the same fracture existed in both X Rays.

We therefore believe that the plaintiff having chosen his forum, is bound by the laws of Pennsylvania.

[fol. 17] We have also found by consideration of the evidence that the plaintiff has failed to overcome the import of the receipt and release signed by him. It is evident that such evidence was not clear, precise and indubitable.

In Court of Common Pleas No. 5, County of Philadelphia.

FINAL JUDGMENT

And now, to wit this 7 day of April, 1941, the defendants' motion for a New Trial is refused; the defendants' motion for judgment non obstante veredicto is sustained, and judgment is entered for the defendants.

By the Court: (Sgd.) Smith, J.

[fol. 18] In Supreme Court of Pennsylvania, Eastern District, January Term, 1941

No. 209

Wade Garrett, Appellant,

v.

Moore-McCormack Company, Inc., and American Scantic Line

Appeal from the Judgment of the Court of Common Pleas No. 5, of the County of Philadelphia, as of March Term, 1937, No. 3221

Opinion of the Court—Filed January 5, 1942

Linn, J.:

Plaintiff, a seaman, sued on two causes of action: (1) pursuant to Section 33 of the Jones Act,[1] 41 Stat. 1007, 46 U. S. C. A. section 688, for damages for negligence; and (2) for maintenance and cure under the admiralty law. He declared for $100,000. The defence was that plaintiff had released his claims. The jury rendered a verdict, "$1,000 for maintenance, and $3,000 for pain, injury and wages." Defendants moved for judgment n. o. v, and their motion was granted on the ground that the evidence was

[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply; * * *" Section 1 of the Federal Employers' Liability Act provides: "Every common carrier, by railroad while engaging in [interstate] commerce * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier * * *" [35 Stat. 65, 45 U. S. C. A. section 51].

insufficient to support a finding that plaintiff's release was invalid. The plaintiff appealed.

Plaintiff was employed as a deck maintenance man on board the S/S MINNEQUA at $50 per month, etc., for a voyage to Baltic ports and return. The voyage began [fol. 19] January 10, 1937, and ended March 5, 1937. He claimed for various injuries but particularly for serious injury to his back, a fracture of the lower transverse spinal processes, which, he alleged, resulted from the fall on him of a defectively fastened ventilator cover. We accept his statement, because corroborated by one of respondent's witnesses, that the accident occurred the day before the vessel reached its first port, Gothenburg, and then he received first aid and went to bed. During the six-hour period the vessel remained in that port, plaintiff remained on board. The next port, Copenhagen, was reached a day or so later and there plaintiff went ashore and, at the captain's request, was examined by respondent's doctor who gave plaintiff a written report, identified by him and in evidence, stating that he had contusions of the first and second fingers of the left hand, no fracture; "The contusion of the right foot is not much. It will be best in treating the fingers that the man don't work for three days with the hand." He remained on shore some time. He testified that he went to a place where he had "some drinks" and that he returned to the ship with a note from the proprietress of a restaurant asking that the captain put him in funds to pay her bill of 30 kroners. The captain testified that, before landing at Copenhagen, he had noticed that plaintiff's hand was painted with iodine and that he instructed him to go to the company's doctor and report back. The captain also testified that on the evening of plaintiff's return to the ship when he brought to him the note requesting the payment of money for the restaurant keeper, the plaintiff "was bleeding from the mouth, and his jaw was swollen." These were injuries the captain had not observed in the morning and the doctor had not found on his examination; obviously they were inflicted on shore. The captain said he declined to give plaintiff the amount because it was more than was owing to him. The ship sailed from Copenhagen the next morning, January 29th, and arrived at Gdynia, Poland, on the morning of the 30th, when the plaintiff informed the captain that he thought his jaw was broken; the captain then

directed that he be taken to a hospital. At the hospital [fol. 20] he was x-rayed and put to bed. He testified that plaster casts were applied to his head and leg and he was put "on fracture boards" for his back. The plaster casts which he says were applied to his head were, we assume, required by the condition of his jaw described by the captain. The ship returned without the plaintiff. Subsequently respondents arranged for his discharge from the hospital and his return on another of their vessels. When the vessel on which he returned arrived at Jersey City, March 18, 1937, he went to the company's office and reported to respondents' agent at the latter's request. Plaintiff testified he said to the agent, "I would like to get what money I have coming to me and go to a hospital. I'm very sick." The agent sent him to the Marine Hospital where x-rays were again taken. At that time the agent paid him $15. because he said he had no money; the next day he received $10., and the day after, $3.; for each payment, he signed a simple receipt. He testified that he thought he had three months' wages due him though he must have been mistaken about that because, by an itemized voucher in the record, he had acknowledged the receipt at Gdynia of his wages in full to February 8th. The voyage, for which he engaged, ended March 5th. During the trial he denied that he had made any claim to the agent for injury, asking only for wages. Respondents' evidence is that he also claimed for injury and was told that the only injury that they believed he had sustained on board was the trivial injury to the fingers reported by the Copenhagen doctor.

On March 24, 1937, in the respondents' office he signed a formal release of all claims; he read the release which was witnessed by two subscribing witnesses and bears a notary's certificate of acknowledgment. The respondents had offered to settle all claims for $100., less the $28. which they had advanced to him, as has been stated, on and after March 18th. He testified that the company's agent said to him, "If you don't sign here and take your money and go to Chicago, I'm going to have you put in jail." He said he had been drinking and had been taken "vernal [veronal?] pills." Asked at the trial, how he was [fol. 21] "feeling at that time," he replied, "I was sick. I said, 'Give me the money' and he wrote it out and said, 'You take this over to 5 Broadway.'" The agent who took

his release did not pay him but gave him the release and directed him to take it to the company's office in New York where the cashier would make payment. He went there and "handed this paper to a man in the office and he tore it open and he handed me back a piece of paper and I signed it, and gave it back to him and he gave me $72." He returned "to Hudson and Jay [Marine Hospital] to get [his] discharge" and then came to Philadelphia.

His own testimony shows that he had been injured a number of times, sometimes on ships, sometimes in fights. For some of these injuries, he received compensation and executed releases and was therefore not unfamiliar with such instruments. For one claim "around April 2nd, 1932" he said he received $4,500. At the time this suit was tried, he had pending an action against the Southern Steamship Company to recover for injuries received in August, 1935. He denied that he claimed in the present suit for the same injuries for which he was claiming in the suit against the Southern Company, but, when confronted with it, admitted his signature to the statement of claim which contained an averment, inter alia, for injury to back and spine. In the present suit he also claimed for injury to the back and spine. The court in banc said: "The testimony produced by the plaintiff is entirely unreliable. He was aware of the attitude taken by the defendant toward his alleged claim. On three different occasions, he accepted money from the agent of the defendant and when he asked for what he claimed was due him, an offer was made him by the agent for the defendant. Showing some reluctance about accepting it, he was told to go home, think it over and come back the next day. This he did. It seems hard to believe that when he knew he was returning for the purpose of adjusting his claim with the agent of the defendant, he would fortify himself with drink and sedatives. We must consider the other statement that he was forced to sign the release under threat of arrest, and we furthermore must not forget that on at least three prior occasions, he had signed releases and was aware therefore of their import. Furthermore, in considering his credibility, we [fol. 22] must not forget that when questioned whether in 1935 (two years before) he had made a claim against the Southern Steamship Company for an injury to his back, his answer was No. The statement of claim presented in that case was put in evidence and a reading of Para-

graph 8 thereof shows his statement: 'He was violently wounded, jarred and generally shaken about the head, body, spine, arms, legs and feet, and particularly his face and jaw were swollen and discolored, several teeth knocked out and several ribs broken.'

"When one considers that the major portion of his claim of injuries is that he has arthritis from the injury received to his spine, one can see how doubtful this claim for injuries is. • • •

"It therefore seems clear that the condition from which this man alleges he is now suffering was present in 1935. It may well be that the arthritic condition has developed, but the same fracture existed in both X Rays."

The evidence offered by defendants would support a finding that the only injuries received "in the course of his employment," or in the service of the ship, were those which were referred to by the Copenhagen doctor in his report.

Instead of filing his libel in admiralty, where his case would have been tried by a judge without a jury, or of suing at law in the District Court, plaintiff, as he had the right to do, sued in the state court to assert a common law remedy with trial by jury. It was the duty of the state court to apply the federal law creating the right of action in the same sense in which it would have been applied in the federal courts. This, we think, was done.

The important point now is whether plaintiff has been deprived by local rules of evidence of a substantive right under the federal law. In dealing with this contention, the effect of the evidence in the record may perhaps be considered as follows: plaintiff presented evidence which, if believed (and apart from the release) would have made out a prima facie case; defendants, to destroy that case, relied [fol. 23] on evidence that the claims had been discharged by payment and release; in other words, plaintiff had offered proof of his causes of action and defendants had offered proof that they had been released. What should be done with the record in that condition?

It is a rule of evidence in this state, that, to set aside a written release of claims, the trial judge, before he may submit evidence on the subject to the jury, must preliminarily determine the fact that the evidence offered against

the release is clear, precise and indubitable: *Scanlon v. Pittsburgh Rys. Co.*, 319 Pa. 477, 480, 181 A. 565; *Aliquippa Nat'l Bank v. Harvey*, 340 Pa. 223, 231; 16 A. 2d 409.

It is unnecessary, in disposing of this appeal, to consider whose duty it was to put in the evidence on the subject because none was excluded; all the evidence is in and the legal question is what is its effect? As the evidence was insufficient to go to the jury, the learned trial judge should have directed a verdict for defendants on the ground that the release was valid. The verdict not having been directed, as requested by defendants, it was the duty of the court in banc, in considering defendants' motion for judgment non obstante veredicto, to decide whether the evidence should have been submitted to the jury (Act of April 22, 1905, P. L. 286, as amended, 12 PS section 681; *Hostetler v. Kniseley*, 322 Pa. 248, 249-250, 185 A. 300) and if insufficient, to enter judgment for the defendants. On passing on that motion, the learned court concluded that plaintiff's evidence and that offered on his behalf was not sufficient to support a finding that the release was invalid and therefore entered judgment notwithstanding the verdict.

There is no doubt about the principle, for which appellant contends, that a state may not require a plaintiff to prove, as part of his cause of action under federal law, more than what constitutes the cause of action as defined by that law. *Central Vermont Railway v. White*, 238 U. S. 506, held that the state law, requiring a plaintiff in a tort action to show that he was not guilty of contributory negligence, could not be applied in establishing a cause of action under the Fed-
[fol. 24] eral Employers' Liability Act because the state law, if applied in such action would require a plaintiff to establish as an element of the cause of action a fact which was not part of it by the federal law. *Engel v. Davenport*, 271 U. S. 33, decided that the state could not require the suit to be brought in one year when the Congress had provided that a plaintiff should have two years in which to assert his federal right of action. The application of the same principle necessarily prohibits the state from depriving a defendant of the right to insist that plaintiff shall prove all the elements of his cause of action: *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367. See, also *Great Northern Railway Co. v. Washington*, 300 U. S. 154.

The terms "rule of evidence" and "burden of proof" have different meanings in different contexts.[2] The plaintiff here was not subjected to the burden of proving, as an element of the cause of action, something which was not an element by the federal law. Nothing that plaintiff wished to put in the record was excluded pursuant to the local rule. This rule, as applied in this jurisdiction, is merely a rule of evidence or trial procedure. It probably had its origin in chancery practice and, as this Commonwealth had no court of chancery but administered equity in common law courts, the rule became part of common law procedure. It provides for measuring the quantum and quality of proof necessary to guide the judge in determining whether an issue of fact for the jury has been presented. We have not been referred to any decision of the Supreme Court determining the point now before us, but it may be noted that in the field of conflict of laws most decisions and text writers [fol. 25] agree that rules of evidence are rules of procedure controlled by the law of the forum.[3]

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[2] Maguire and Epstein: Preliminary Questions of Fact in Determining The Admissibility of Evidence, 40 Harv. L. Rev. 392; Morgan: Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165; Morgan: Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59; See, generally, Cook: "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333.

[3] *Singer v. Messina*, 312 Pa. 129, 167 A. 583; *Fortein v. D., L. & W. Ry. Co.*, 90 N. J. L. 137, 100 A. 194; Restatement, Conflict of Laws, sec. 595, comment a, page 710; comment b, page 711. And, see, *Martin v. Burgess*, 82 F. (2d) 321 (C. C. A. 5th). Goodrich, Conflict of Laws, (2d ed.) pp. 197, 198: "It has already been stated that matters of procedure are in general determined by the internal law of the forum. It would naturally follow that the rules of evidence should so be classified. These relate to the way in which a case is to be proved, how facts are to be established. If the lex fori requires proof of a certain kind, it would not seem to matter whether the cause of action arose within or without the jurisdiction. * * * The same would be true in deciding the question whether a plaintiff had established, on the facts, a case sufficient to go to the jury." Beale,

We have been referred to cases in which seamen's releases were considered by admiralty courts. In *The Adonis*, 38 F. (2d) 743, decided in this Circuit, it appeared that a seaman filed a libel for maintenance and cure and for damages for injuries. Respondent set up a release. In reaching the same conclusion that was reached by the judge below, the Circuit Court of Appeals said: "We realize that a release of this kind is not a bar preventing inquiry into the seaman's rights. It can always be looked into. The Topsy (D. C.) 44 F. 631; The David Pratt, 1 Ware, 510, Fed. Cas. No. 3597. But a release of this kind, formally [fol. 26] signed, sealed, and witnessed, is, however, prima facie good, and cannot be set aside unless it was obtained by duress, mistake, or, in this case, by fraud, in that the instrument admitted in evidence is not in all respects the instrument the seaman signed. • • •

"The libellant realizing that to put the release out of the case he must sustain the burden of proving that he signed it through duress, fraud, or mistake, says, finally, that he signed it through mistake in that he did not read it, and 'thought it was a receipt for the $125 (he) was getting.' There is no evidence that the libellant could not read. There is evidence that he looked at the paper. He signed it. He is therefore presumed to have known and understood its contents. The Henry S. Grove (D. C.) 22 F. (2d) 444. Had he read it, he could not have been misled into believing it was anything short of a release. There is no evidence that the Casualty Company did anything to induce him to sign the paper other than tender him a check for the amount agreed upon, or said anything to make him believe it was a mere receipt. Indeed, the record is bare of a suggestion that the libellant was tricked into signing the paper by false representations of the company's agent. The Annie L. Mulford (D. C.) 107 F. 525; The Belvedere (D. C.) 100 F. 498. After a careful consideration of the testimony, we are constrained to hold that there is far too little to have justified the trial court,

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Conflict of Laws (1935) vol. 3, p. 1611: "The close connection between the ordinary presumption and problems of burden of proof is readily apparent. Hence it is not surprising that courts have held that burden of proof is procedural and governed by the law of the forum."

or to justify this court, on trial de novo, in declaring the paper invalid because of duress, fraud, or mistake."

The appellant says that when a release is relied on in the Second Circuit (Hume v. Moore-McCormack, 121 F. (2d) 336) the employer must show affirmatively that there was no fraud. With the evidence all before us, it is not important, to consider whether different results on similar evidence could properly be reached in admiralty in the two circuits; presumably the courts would reach the same result, for, after all, the judge, whether in the admiralty or at law is responsible for his decision on the evidence presented. We think there is no substantial difference in the subjective process by which the judge in admiralty [fol. 27] arrives at the ultimate fact—the effect to be given to a release—and the same process by which a judge presiding at law would reach or permit the result to be reached by a jury. Such procedural difference, as exists, is the necessary result of the presence of the jury in one case and not in the other.[4]

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[4] Wigmore, Evidence, (3d ed.), vol. 9, page 278, section 2487, says: The inquiry peculiarly concerns the procedure in legal controversies; but the settlement of it was not affected by the nature of the tribunal. The tribunal might be a judge, or a jury, or both, so far as regards apportioning the risk of non-persuasion. Nothing has been said, or need be, about a distinction between *judge* and *jury*. But we come now to a peculiar set of rules which have their source in the bipartite constitution of the common-law tribunal. Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits.

"The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course;* that each party must first with his evidence pass the gauntlet of the

[fol. 28] We should perhaps add that if we had concluded that the judgment should be reversed on this, the plaintiff's appeal, we should not have directed judgment to be entered on the verdict but should have been required, by our consideration of the evidence, to have re-instated defendants' motion for a new trial and remitted the record for consideration by the court below of that motion.

Judgment affirmed.

[File endorsement omitted.]

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—May 11, 1942

On Consideration of the motion for leave to proceed further herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 30] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 11, 1942

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania is granted.

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judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the other burden of proof (in the sense of the risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1086)